

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ROBERT J. DEL TUFO, Attorney General of New Jersey and C.
GREGORY STEWART, Director, New Jersey Department of
Law and Public Safety, Division on Civil Rights,

Petitioners,

—v.—

THE IVY CLUB, a New Jersey Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF AMICUS CURIAE OF TIGER
INN IN OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI IN SUPPORT OF RESPONDENT
THE IVY CLUB**

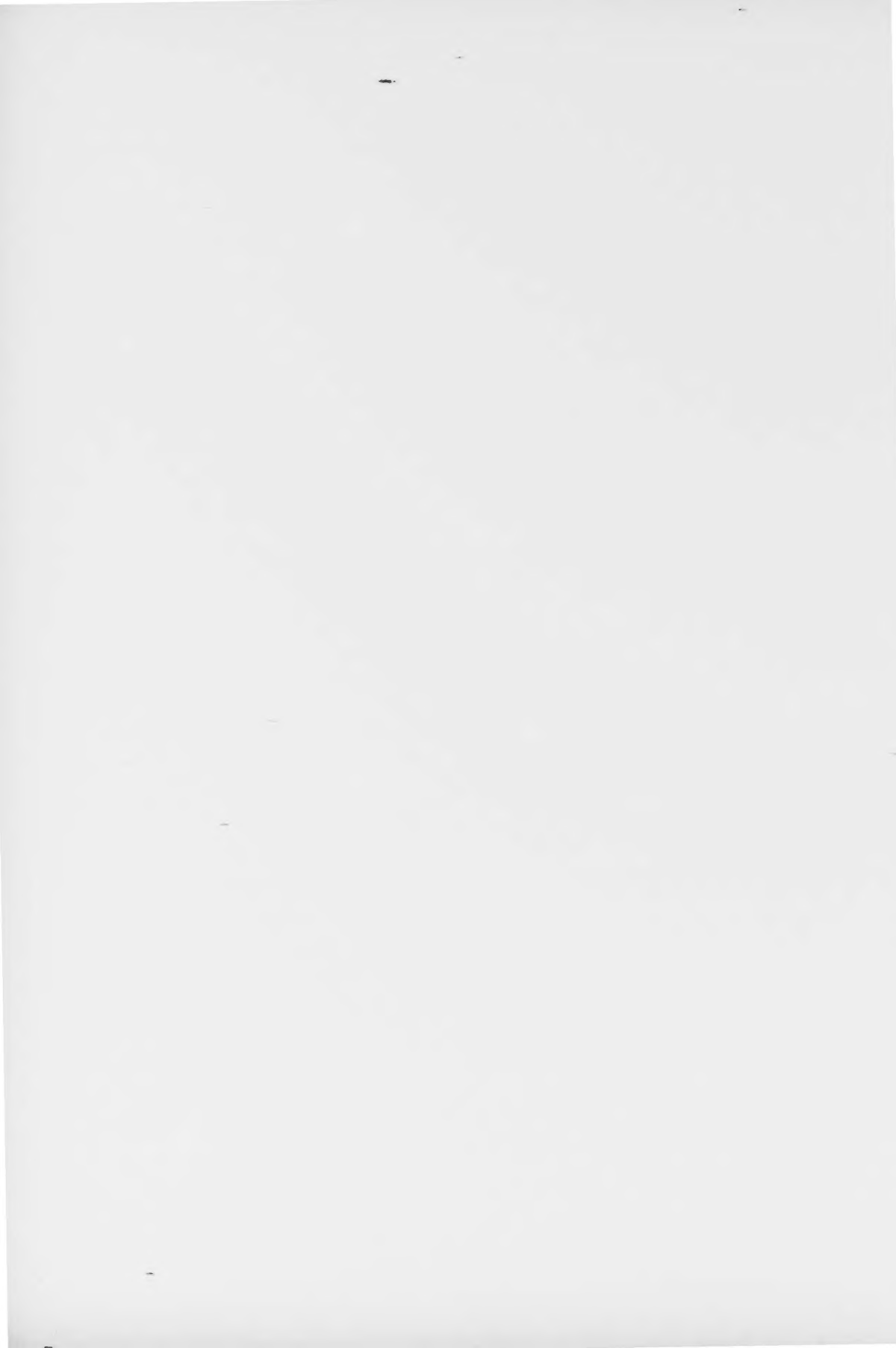
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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Tiger Inn ("Tiger Inn") respectfully moves for leave to file the annexed brief amicus curiae in opposition to the petition for a writ of certiorari of defendants Robert J. Del Tufo and C. Gregory Stewart and Intervenor-defendant Sally Frank and in support of respondent The Ivy Club ("Ivy"). The consents of the attorneys for defendants and intervenor were not obtained because they could not be reached.

In February 1986, Ivy and Tiger filed a complaint in the United States District Court for the District of New Jersey. By Order dated June 9, 1986, the District Court stayed Ivy's and Tiger's federal action under a federal case-law doctrine of abstention pending resolution of an existing state proceeding. In 1990, Ivy moved to reinstate its case in the District Court. The District Court granted Ivy's motion to reinstate the case and certified its decision to the United States Court of Appeals for the Third Circuit. The decision was affirmed. Tiger Inn then moved to reinstate its case. Tiger Inn's motion was granted in December, 1991.

After Ivy's motion for reinstatement had been granted, a motion for summary judgment applicable to Ivy had been filed by the Intervenor Defendant. Defendants Del Tufo and Stewart joined in the motion. When Tiger Inn's motion to reinstate was granted, the motion for summary judgment was made applicable to Tiger Inn as well. It was then briefed and argued. On February 19, 1992, a decision was rendered denying the motion. At that point Tiger Inn became a litigant in the case at the District Court level.

Meanwhile, the State Defendants and the Intervenor-Defendant had filed the petition for a writ of certiorari seeking review of the decision by the United States Court of Appeals for the Third Circuit. Tiger Inn, of course, had not been a party to that decision and had no role in the briefing of the petition for certiorari.

After the motion for summary judgment was denied, Tiger Inn reviewed the papers on the petition and decided that it should present its views to the Court.

Tiger Inn, now in active litigation in the proceedings below, would be directly affected by any decision on the pending petition for a writ of certiorari. Tiger Inn has every bit as much interest in the outcome of the proceeding in this Court as if it were an actual litigant. Only the peculiarities of the timing of its participation in the case prevented it from submitting its papers as a litigant, rather than in the form of a motion for leave to file a brief *amicus curiae*.

We respectfully request the Court to accept this motion, which is out of time, on the ground that it could not reasonably have been made at an earlier time. We also respectfully request that Tiger Inn be permitted to file this brief *amicus curiae* on the additional ground that it will be directly affected by any matters involving the decision by the Court of Appeals for the Third Circuit.

Respectfully submitted,

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
QUESTIONS PRESENTED	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
POINT I—THIS CASE INVOLVES EQUITABLE PRINCIPLES OF FAIRNESS, NOT THE <i>PULLMAN/ENGLAND</i> DOCTRINE, AND IS, THEREFORE, NOT A PROPER SUBJECT FOR REVIEW BY THIS COURT	2
POINT II—BECAUSE STANDARD RULES OF PRECLUSION WERE ROUTINELY APPLIED BY THE THIRD CIRCUIT, ITS DECISION IS NOT APPROPRIATE FOR REVIEW BY THIS COURT	5
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:	PAGE
<i>Adams v. Miami Police Benevolent Ass'n, Inc.</i> , 454 F.2d 1315 (5th Cir. 1972)	6
<i>Alfone v. Sarno</i> , 87 N.J. 99, 112, n.9, 432 A.2d 857, 864 n.9 (1981)	6
<i>Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation</i> , 402 U.S. 313 (1971)	6
<i>Burton v. Wilmington Parking Authority</i> , 365 U.S. 715 (1961)	6
<i>City of Plainfield v. Public Service Electric & Gas Co.</i> , 82 N.J. 245, 257, 412 A.2d 759, 765-66 (1980)	6
<i>England v. La. Board of Examiners, et al.</i> , 375 U.S. 411 (1964)	1
<i>Katinsky v. Radio Shack</i> , 524 F. Supp. 807 (D.N.J. 1980)	5
<i>Parklane Hosiery, Co. v. Shore</i> , 439 U.S. 322, 326 n.5 (1979)	5
<i>Pittman v. La Fontaine</i> , 756 F. Supp. 834, 841-42 (D.N.J. 1991)	6
<i>Railroad Commission of Texas v. Pullman</i> , 312 U.S. 496 (1941)	1

BRIEF AMICUS CURIAE OF TIGER INN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

Tiger Inn, as amicus curiae, has a direct interest in the outcome of the case currently pending before this Court. Tiger Inn is a litigant in the case in the District Court. It is not a captioned litigant in this court only because of the timing on its motion for leave to reinstate its federal claim and the motion for summary judgment. In practical effect, Tiger Inn has as great an interest in this case as any litigant would in any case; and its interest in the outcome of the current proceeding before this Court is every bit as great as that of Ivy.

QUESTIONS PRESENTED

1. Is the application of ordinary equitable principles of fairness in a case involving a misapplication of the *Pullman-England* doctrine a matter of wide-spread importance with potential impact on the rights of a significant number of litigants and, therefore, appropriate for interlocutory review by this Court.

2. Is the ordinary application of established federal and state doctrines of preclusion a matter of sufficient importance for review by this Court.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Third Circuit involves the exercise of equitable principles. It does not involve any application, construction, or new interpretation of the doctrine of abstention announced by *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941) or the methodology for preserving *Pullman* rights announced by *England v. La. Board of Examiners, et al.*, 375 U.S. 411 (1964). No important principles of federal jurisdiction are

involved in this case; no important principles of federal rights are involved; and no important construction of any doctrine of federal jurisdiction was announced by the Third Circuit. This case involves the standard application of standard principles of equity to a situation in which a party was mistakenly misled and in which the party then lost its right to have its federal question determined. This kind of question should not be considered by this Court on discretionary, interlocutory review. (Point I)

No unusual application of state or federal doctrines of issue preclusion or claim preclusion are presented in this case. The Court of Appeals routinely applied federal and state rules of preclusion. It created no new rules and announced no new interpretation of old rules. As a consequence, any question raised by application of the rules of preclusion in this case involve merely the ordinary disputes between the litigants in this case. No wide-spread principle involving many litigants is presented; and therefore, this court should not grant discretionary review. (Point II)

ARGUMENT

POINT I

THIS CASE INVOLVES EQUITABLE PRINCIPLES OF FAIRNESS, NOT THE *PULLMAN/ENGLAND* DOCTRINE, AND IS, THEREFORE, NOT A PROPER SUBJECT FOR REVIEW BY THIS COURT

The Court of Appeals for the Third Circuit repeatedly stated that the decision it was rendering was unique, that it would have no effect on any other litigant, and that a basic purpose of the decision was to prevent its use by other litigants. At the very outset the Court said:

This appeal, the procedural posture of which has all the trappings of a law school examination question, requires us to explore the boundaries of the several theories under which the federal courts abstain from exercising

their jurisdiction in deference to comity with the state courts.

* * *

[W]e hold that Ivy, in the *unique* circumstances we have here, sufficiently reserved its right to litigate its federal claims in federal court. [Petitioner's Appendix ("App.") 2-3.] [emphasis supplied]

The uniqueness of the decision in this case and its lack of general application was mentioned at other times in the opinion. For example, "[t]he law of the case argument . . . supports the majority view for it validates the exercise of equitable principles under the *unique* circumstances of this case." [App. 25-26] [emphasis supplied]. And, "That no court has decided what should happen under these *unique* circumstances does not mean that we can not, or should not, decide the case according to the dictates of justice." [App. 27].

The Third Circuit explained on several occasions in its opinion that it was applying principles of equity to the circumstances before it and that it was not applying the federal doctrine enunciated in the decisions in *Pullman/England*. After noting the dilemma in which Ivy was placed by the Court's decision to abstain in the initial federal litigation, the Third Circuit said,

We are therefore left with a balancing of the equities. Ivy, on the one hand, detrimentally relied on the District Court's decision to stay this action. . . . We are less troubled by any perceived unfairness to the defendants because of two factors: First, it was in response to the defendants' urging that the Court abstained Second, at least on the record before us, defendants failed to raise any objection to Ivy's England reservations in the state court. Accordingly, a sense of basic fairness dictates that Ivy be permitted to litigate its federal claims in the federal forum. [App. 24 (footnote omitted)]

And later in the opinion the Court of Appeals commented on its exercise of equitable powers (not *Pullman/England* powers), as follows:

A court should not mechanistically apply precedent and when finding none to fit the case at bar, throw up its hands and state that the equitable issues may not be explored.

* * *

In sum, to analyze the case as if it were a straightforward *England* case and decide it on that basis not only deprives Ivy of its full and fair opportunity to litigate its federal claims because of the district court's decision to retain jurisdiction, it also misleads future state court litigants to believe that if only they are more "effective" than Ivy in making its England reservation, every state court defendant has a right to litigate its federal claims in federal court. [App. 27-28]

In several places in the opinion, the Court reconfirmed its exercise of equitable principles and its intention to make its exercise case-specific. The consequence of its ruling, therefore, was to make it meaningless as a precedent to be followed by future parties. The Court said:

The law of the case argument, however, supports the majority view for it validates the exercise of equitable principles under the unique circumstances of this case. However, were we just to assume that the *Pullman* abstention was the "law of the case" and not discuss its inappropriate use in the situation we have here, nothing would discourage, or indeed, prevent future parties from relying on it as binding precedent. [App. 25-26]

The discussions of the *Pullman/England* doctrine in the petitions are irrelevant to the considerations of this Court. Both the District Court and the Third Circuit applied principles of equity to unique factors which will probably never again be encountered.

As a consequence, the decision in this case involves nothing more than the application of standard equitable principles to a unique set of circumstances. It does not present the kind of far-reaching federal issue that should be decided by a policy-making court of last resort.

POINT II

BECAUSE STANDARD RULES OF PRECLUSION WERE ROUTINELY APPLIED BY THE THIRD CIRCUIT, ITS DECISION IS NOT APPROPRIATE FOR REVIEW BY THIS COURT

Ivy is not barred by claim or by issue preclusion from litigating its federal right to freedom of association because the claims are not identical and because Ivy did not have a full and fair opportunity to litigate the issues.

Claim preclusion is not applicable here because identity of issue is lacking. *Parklane Hosiery, Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979); *Katinsky v. Radio Shack*, 524 F. Supp. 807 (D.N.J. 1980) (court declined to apply preclusion where the federal claim was different from the state claim, despite the involvement of many of the same facts).

The New Jersey Supreme Court relied on the relationship between the Clubs and Princeton University:

in analyzing the materiality of the facts, it is critical to understand that the Division rejected the theory that the Clubs themselves were places of accommodation. Instead, the Division premised its conclusion that the Clubs were not distinctly private on its finding that "the relationship between the Clubs and Princeton University is one of integral connection and mutual benefit. [App. 110]

The federal law dealing with the effect of ties between organizations on the right to freedom of association is different. To establish a relationship that overrides the right to freedom of association, one must show close, bilateral ties

between the two, substantial affirmative reliance on Princeton University by Ivy, and some degree of control of Ivy by Princeton University. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Adams v. Miami Police Benevolent Ass'n, Inc.*, 454 F.2d 1315 (5th Cir. 1972).

As the Supreme Court of New Jersey itself said, control, which is necessary to the federal test based on a relationship, was unnecessary to its decision:

The finding of an integral and symbiotic relationship is based on the undisputed factual conclusions that the Clubs need the University and the University needs the Clubs, rather than on any particular act of control or integration. [App. 112]

Hence, claim preclusion is not available here because the elements of the federal claim are different than the elements of the state claim.

Issue preclusion (collateral estoppel) is proper only when the identical issue was actually litigated and determined in the prior proceeding and was essential or material to the judgment. If it was not material to the judgment, the party opposing it had no full and fair opportunity to litigate the issue. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); see also *Pittman v. La Fontaine*, 756 F. Supp. 834, 841-42 (D.N.J. 1991).

New Jersey law is the same. New Jersey courts preclude relitigation of an issue only when it was actually litigated and determined and was essential to the judgment. *Alfone v. Sarno*, 87 N.J. 99, 112, n.9, 432 A.2d 857, 864 n.9 (1981); *City of Plainfield v. Public Service Electric & Gas Co.*, 82 N.J. 245, 257, 412 A.2d 759, 765-66 (1980).

The Supreme Court of New Jersey noted repeatedly that its finding of liability under New Jersey law was based entirely on the Division's Finding of Probable Cause and that the Division's Finding of Probable Cause was based only on stipulated facts. Because the stipulated facts were used as the basis for the relationship decision by the New Jersey Supreme

Court, these facts were material to the decision; and they were given preclusive effect. Again, according to the New Jersey Supreme Court:

Applying these principles to the facts, the Division gave little weight to the Clubs' present financial and legal independence from the University. Neither did it rely heavily on evidence of historical connections between the Clubs and the University. Instead, the Division drew from undisputed facts demonstrating that "the University and the Clubs are in reality integrally connected." [App. 111]

Hence, the facts that were material to the decision of the New Jersey Supreme Court on the "sympiotic" relationship were carried forward to any future federal case. Under these circumstances, no conflict between the circuits is relevant to any preclusion determinations by the Third Circuit. Hence, no matter of importance has been presented to this court for review.

CONCLUSION

The dilemma which has engulfed Ivy and Tiger Inn in this case from the beginning has been entirely the creation of their adversaries, who successfully avoided a trial when it had been ordered by the Appellate Division (twice), and short-circuited every other victory by Ivy and Tiger Inn. Having caused 12 years of delay, they now say that the rights of the litigants to a resolution of their federal claim should be ignored because the case is old.

But the federal rights of Ivy (and Tiger Inn) do not lose their lives merely because the conduct of the defendants has kept those federal rights incarcerated for 12 years. When the District Court denied the motions for summary judgment by the State Defendants and the Intervenor-defendant on February 21, 1992, it ordered an immediate trial, saying that the trial

is going to take place sooner rather than later and I will be very unreceptive to any position that a lot of time is necessary to prepare for this hearing.

We respectfully request that the petition for certiorari be denied and that this case be allowed to proceed to trial on the federal issue.

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